evidence exaggerated it is obvious that this marriage has not been a happy one. I do not think it a case for damages and I award none.

The co-respondent knew that the respondent was a married woman. Under O. XVI r. 21 (2) and 25 (1) I order him to pay as costs the Court fees which the petitioner would have had to pay had these proceedings not been *in forma pauperis*.

Decree Nisi.

[ORIGINAL CIVIL JURISDICTION]

CAREY, J.

March 12, 1941.

MELAH BINTI INDOT (f) ADMINISTRATRIX OF THE ESTATE OF CHE PAH alias PAH BINTI KASAH DECEASED

vs.

TAMBYSAH BIN HAJI KASSIM & ORS.

[PENANG IN FORMA PAUPERIS SUIT No. 52 of 1940]

Limitation Ordinance (Cap. 16)—Adverse possession—Claim by representative of deceased person against adverse possessor.

In the case of a claim to immovable property made by the representative of a deceased person against an adverse possessor, time runs in favour of the possessor notwithstanding that no grant of representation to the estate of the deceased has been taken out. One of the two tenants in common can by adverse possession acquire a right against the other tenant in common; this depending upon whether his possession was adverse in fact.

Cases referred to:—

(1) *In re Ena Mohamed Tamby deceased,* (1932), 1 M.L.J. 128.
(2) *Sultan bin Hashim v. Lamsah,* 5 S.S.L.R. 61.
(3) *Ismail bin Savoosah v. Madinasah Marican,* 4 Ky. 311.
(4) *Murray v. The East India Co.* (1821), 5 Barn & Ald. 204.
(5) *Corea v. Appuhamy & Anor.* (1912), A.C. 230.
(6) *Meyappa Chetty v. Supremanian Chetty* (1916), A.C. 603.
(7) *Hee Ann Hup v. Kolanthavan Chetty* (1923), 15 S.S.L.R. 249.
(8) *Ho Yang Peng v. Talib bin Haji* (Singapore). Suit No. 75 of 1929 (unreported).
(9) *In re Marie Louise Caunter deceased,* 7 M.L.J. 174.

TRIAL.

K. S. Pillai for plaintiff.

Lim Cheng Ean for 1st, 2nd and 3rd defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Carey, J.—The Plaintiff's claim is as the administratrix of the estate of Che Pah binti Kasah deceased.

(a) for possession of the one-half undivided share of the land known as Lot 181 Mukim H South West District Penang wrongfully sold and conveyed by the 1st defendant to the 2nd defendant on the 12th day of July 1937 who in turn sold the same to the 3rd defendant on the 9th day of August 1937 and the said 3rd defendant who is the present owner mortgaged the same to the 4th defendant on the 17th day of March 1939;

(b) to set aside the said conveyance dated the 12th day of July 1937, 9th day of August 1937 and the mortgage dated the 17th day of March 1939 and thereafter for rectification of Register by cancellation of entries made therein;

(c) to have an account of the income and expenditure in respect of the said land and payment to the plaintiff of any balance found due by the defendants to the plaintiff from the date of conveyance by the 1st defendant up to date hereof;

(d) further and other reliefs; and

(e) costs.

In the statement of claim the plaintiff averred that Che Pah died about 27 years ago and at the time of her death was seized in fee simple and in possession of one-half undivided share of the land known as Lot 181 Mukim H South West District Penang. That after Che Pah's death her husband, Indot, the plaintiff's father was in possession on behalf of Che Pah's next of kin and that after his death the plaintiff about 7 years ago came into possession of the said undivided half share. That on the 12th July 1937 the 1st defendant, after making a Statutory Declaration that he had been in adverse possession of the said undivided half share, wrongfully sold and conveyed the same to the 2nd defendant who in turn on the 9th August 1937 sold to the 3rd defendant who has mortgaged the said share to the 4th defendant.

That by operation of law the said half undivided share became vested in the plaintiff as administratrix of Che Pah deceased.

The 1st defendant in his statement of defence says he sold the said share on the 12th July 1937 and delivered up possession thereof to the 2nd defendant after having been in adverse possession thereof for more

than 20 years prior to the date of the sale. He denies the alleged possession by Indot and the plaintiff or that he wrongly sold and conveyed the said share.

The 2nd and 3rd defendants make similar denials and the 2nd defendant says he is not in possession having parted therewith when he sold to the 3rd defendant on the 9th August 1937.

The 3rd defendant says further that he is in possession and will rely on Limitation Ordinance (Chapter 16).

The 4th defendant merely attended to hand over to the Court the documents of title. He is not otherwise interested and he filed no defence.

Each of the transactions between the 1st and 2nd defendants, 2nd and 3rd and 3rd and 4th defendants is evidenced by deed which has been duly registered.

The plaintiff gave and called evidence with a view to showing that rent had been received by her father, her sister or herself in respect of the said share up till about three or four years ago.

She only succeeded in satisfying me that that evidence was quite unreliable and that there is no proof of any rent having been received by her father, her sister or herself out of the plot in question.

The facts are that after the death of Kasah the whole plot 181 was in the possession of Che Pah and her sister Rahamah, who took out Letters of Administration to their deceased parent Kasah on the 18th March 1907. On the 25th July 1907 Che Pah and Rahamah conveyed the whole plot to themselves as tenants in common. On the 9th July 1907 they had both leased the plot for a term of six years for which they received 6 years' rent in advance. In 1909 Rahamah began to deal with her undivided half share by mortgaging it and numerous transactions occurred which I need not particularize here.

I am satisfied that as regards Che Pah's one-half undivided share, she, Che Pah, her husband and their children left Balik Pulau and went to Perak about 30 years ago and there were no dealings with Che Pah's half share thereafter by Che Pah, her husband or children until the Plaintiff took out Letters of Administration to Che Pah on the 9th May 1938 and began to assert her present claim.

In the meanwhile on the 29th May 1913 one Noordin had purchased a half undivided share in plot 181, that was the undivided half with which Rahamah had dealt. It was sold by the mortgagee.

I am inclined to think that up to this time, in spite of the evidence given by Haji Kassim, he professed to have some interest in the plot, because I find he was a party of the 2nd part with his brother Din to a mortgage of which Rahamah was the party of the 1st part and a chetty of the 3rd part in 1911 and again after the sale to Noordin in 1913 a mortgage was immediately executed by Noordin of the 1st part Haji Kassim of the 2nd part and the mortgagee of the 3rd part of a half undivided share of plot 181. He was not cross-examined as to this.

In 1917, by arrangement with Noordin, the 1st defendant acquired the right to cultivate Noordin's portion of the plot and he says quite frankly that he then formed the intention of acquiring the ownership of the other undivided half by occupying it until such time as he ousted the real owner. He says from then on he cultivated the whole plot in so far as it was capable of cultivation.

I am satisfied that he was in possession of the whole plot from 1917 until he sold the half undivided share to the 2nd defendant in 1937. His original entry on the plot was by right of the letting from or licence given to him by Noordin the owner of the half share of the other original tenant in common, Rahamah. Throughout his period of possession his right to occupy one undivided half share, namely the half share of Noordin, existed by reason of such licence.

The plaintiff contends that because 1st defendant had a right of possession as representing one of the two tenants in common he could not acquire by such possession a right against the other tenant in common as there had never been any partition of the property.

The local law on the subject is contained in the Limitation Ordinance, Chapter 16 of the Laws of the Straits Settlements. Section 3 thereof reads:—

> "Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed, provided that limitation has been set up as a defence."

In the Schedule, Article 110 is as follows:— "For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, the period of limitation is twelve years from the date of the dispossession or discontinuance" and Article 112 is "For possession of immovable property or any interest therein not hereby otherwise specially provided for, the period of limitation is twelve years from the date when the possession of the defendant becomes adverse to the plaintiff".

In subsection (1) of section 16 it is provided:—

> "When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application".

but subsection (3) provides:—

> "Nothing in subsection (1) applies to suits for the possession of immovable property".

Section 25, which was added by Ordinance 10 of 1929, is in the following words:—

> "At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immovable property the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished".

This last quoted section has been held not to be retrospective so as to confer a title by adverse possession for a period which had expired before the Ordinance came into force. (*In re Ena Mohamed Tamby deceased*[1]).

There is nothing in the evidence to show that the period of 12 years' possession whether adverse or not had expired before Ordinance 10 of 1929 came into force on the 6th June, 1929. If the plaintiff's age is 40 years as she alleges she was under legal disability to sue by reason of infancy until 1922 and by virtue of section 6 of the Ordinance time would not have begun to run against her before that year, so it does not seem material whether or not section 25 had retrospective effect.

The plaintiff's Counsel relies on two main points:—

(1) That time only began to run against the plaintiff from the date on which she took out Letters of Administration to Che Pah and

(2) That the 1st defendant, having been in possession by virtue of the licence given him by or of the tenancy created by the arrangement made with Noordin the owner of the other undivided half share, could never acquire a prescriptive right against the remaining tenant in common.

Now to deal with these in order; the first point is based on section 16 (1) of the Ordinance and certain reported cases.

The case of *Sultan bin Hashim v. Lamsah,*[2] was decided in 1897 and the Limitation Ordinance then in force was No. 6 of 1896, the Ordinance still in force, but then there was no such provision as has been added by section 25, as was pointed out in the judgment by the reference to clause 34 of 3 and 4 William IV cap. 27. The defendant in that suit had not been in possession for 12 years and had no conveyance from his predecessor who had had possession for more than 12 years. That was the ground of the decision. The final paragraph of the head-note is misleading and is based on the argument of the plaintiff's counsel and not on the judgment.

The earlier case (1887) of *Ismail bin Savoosah v. Madinasah Merican & Anor.,*[3] was decided under the provisions of the Indian Act No. 14 of 1859. The relevant part of that Act is as follows:—

> "No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—
>
> To suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose".

It was held that the words "cause of action arose" imply that there must be a person *in esse* capable of suing before the Act can begin to run and therefore the date of the grant of Letters of Administration was the material date in that case.

Murray v. The East India Co.,[4] was a suit in which it was held that the statutes of limitation (21 Jas., 1C 16 S. 3) began to run from the time of granting letters of administration and not from the time when the bills which were sued upon in that suit became due. In the judgment of the Court of the King's Bench delivered by Abbott, C.J., having referred to the wording of the statute and the variations of expression therein and in the statute 32 Hen 8 c. 2, the learned Chief Justice went on to say "But it is not necessary to particularize them"; (the variations of expression) "the object manifestly being to limit the time of entry or suit to a person *in esse,* capable of entering or suing, and nothing more".

The case of *Corea v. Appuhamy & Anor.,*[5] decided by the Privy Council on appeal from the Supreme Court of Ceylon arose out of the entry in 1878 by one of four co-parceners by descent into possession of the property in dispute and the settling of the same on his son in 1907.

The law of Ceylon then was similar to what it was in England before 3 and 4 William 4 c. 27 s. 12 in that possession by one co-parcener was possession by the others and sec. 3 of the Ceylon Limitation Ordinance 1871 further provided that the possession relied on by

a defendant must be a title adverse to or independent of that of the plaintiff. The claim was by the assignee of the other co-parceners for partition and it was held that the defendant's possession, unless there was clear evidence to the contrary, must be referred to the title by descent and enured for the benefit of his co-heirs.

In the judgment delivered in that suit the principle that "Possession is never considered adverse if it can be referred to a lawful title" was endorsed.

That eminent lawyer Mr. Roland Braddell in his interesting and instructive commentary on The Law of the Straits Settlements, 2nd edition, Vol. II at p. 66, to which counsel has referred, sets out the following passage from the judgment of the Privy Council in *Meyappa Chetty v. Supremanian Chetty*[6]:—

> "There was a good deal of discussion before their Lordships' Board as to what would have been the result had the English Statutes of Limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court and throwing light on the meaning of the Ordinance of the Straits Settlements. For the purpose of the English Statutes of Limitation time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be someone who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death time will at once begin to run, if there be an executor, even though probate has not been obtained, **Knox v. Gye**; but if there be no executor, time will run only from the actual grant of Letters of Administration **Murray v. East India Co.**[4]. It is, in their Lordships' opinion, probable that (section 16 (1)) of the Ordinance in question was intended to apply this rule".

The learned author has adopted the numbering of the Ordinance as it is at present; section 16 having been previously section 17 to which that judgment refers in the original as reported. The claim in that suit was for a declaration that a partnership had been dissolved and for partnership accounts. There was no question as to the suit being one for the possession of immovable property and naturally there was no reference to subsection 3 of section 17 (now section 16). The passage quoted and the decision in *Murray v. East India Co. supra* related to the English Statutes of Limitation for the purpose of which, as his Lordship Lord Parker of Waddington, who delivered the judgment of the Privy Council, said "time runs from the accruer of the cause of action". Section 2 of 3 & 4 William IV, cap. 27, is as follows:—

> "And be it further enacted, that after the Thirty-first Day of December One thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same".

In the case of *Hee Ann Hup v. Kolanthavan Chetty*,[7] to which Mr. Braddell refers immediately after the quotation just cited, Brown, J. in referring to the effect of section 16 of the Limitation Ordinance, expressly confined that reference to a suit for possession of land. In this connection, a passage in the judgment of Wood, J. in the case of *Ismail bin Savoosah v. Madinasah Merican & Anor.* supra (at pp. 314 and 315 of the report) to which Mr. Braddell also refers, is illuminating—

> "The only other point which is in my judgment material, is that which has been argued at such great length in the case, viz., whether in an action by an administrator for the recovery of land in this Colony, —where, by the Indian Act 20 of 1837, all immovable property is declared so far as regards transmission on the death of any person, to be of the nature of chattels real and not of freehold,—the Statute of Limitation (applicable hereby the Indian Act 14 of 1859) begins to run from the time of the grant of the Letters of Administration, and not from the time of the possession of the land by the defendant, assuming it to be a dispossession in the ordinary sense of the word, and without regard to the special character of the possession alleged by the plaintiff in his evidence, upon the simple ground that for want of a person capable of suing no cause of action can arise.
>
> Upon this point I consider myself bound by the authority of **Murray v. East India Co.**,[4] which I understand to be undisputed law up to the present day with respect to chattels, not chattels real, and with respect to chattels real up to the time of the passing of 3 & 4 Wm. IV c. 27. By this Act, section 6, the law is reversed with respect to chattels real in England, so that the period of limitations runs from the death and not from the grant of Letters of Administration, but no similar law has ever been enacted so as to have effect in this Colony, and the language of Sub-section 12 of the Indian Limitation Act 14 of 1859, being similar—to use the words of Abbot, J., 4 B. & Ald. 215—"notwithstanding any slight variation in phrase, the object and intention being the same"—to those of the Act referred to in that judgment, we are I think, bound by the decision in that case".

In the case of *In re Ena Mohamed Tamby deceased supra* Terrell, J. in his judgment says:—"Mr. Smith further argued that section 16 of the Ordinance (Section 17 of the Indian Act) showed that under the Ordinance the ordinary rule did not apply in the case of immovable property. According to *Mitra 10th Ed.* p. 147, the section (subsections (1) & (2) adopts the general rule that a complete cause of action cannot accrue unless there be a person in existence capable of suing another person in existence of being sued. On page 149 his note to subsection (3) reads "The third subsection provides that the rule of this section shall not apply to enforce right of pre-emption or to suits for the possession of immovable property or an hereditary

office, because the application of the rule to such cases would tend to create insecurity of title". I take this to mean that in respect of immovable property a person entitled to administration will find time running against him from the death and that he cannot escape the running of time by delay in taking out letters of administration. This construction appears to have been adopted in the Colony in the unreported case of *Ho Yang Peng v. Talib bin Haji,*[8] (see written judgment of Stevens, J.) "In that case the person in possession succeeded against the administrator who had failed to apply for letters of administration for 31 years. It should, however, be remarked that if the section is intended to enact that in the case of immovable property the executor or next of kin of a deceased shall be in a worse position than they would be in the case of any other property belonging to the deceased, the section is not very happily worded. Subsection (3) excludes the operation of the section in the case of immovable property, and if, as would appear to be the case, the general intention of the Ordinance is not to prejudice the rights of parties who are not in a position to sue it is difficult to extract from section 16 any direct provision to the contrary. No authority was cited in support of the proposition except the passage from *Mitra* and the unreported judgment of Sevens, J. However that may be, I do not think that under the Ordinance time can run in the case of immovable property unless there is someone who is in a position to apply for probate or letters of administration. This circumstance entirely differentiates the present case".

In that case the plaintiff was not in a position to sue until the issue of Probate to the 1st defendant was revoked and she herself obtained a grant of Letters of Administration and this and the fact that the 1st defendant entered into possession *qua* executor and trustee and only later tried to assume absolute ownership were the main points upon which the decision rested.

In another case, cited by counsel for the defendants 1, 2 and 3, *In re Marie Louise Caunter deceased, Ex parte J. D. Caunter & 2 Others*[9] Gordon-Smith, J. held that Article 114 of Part VII of the Schedule to the Limitation Ordinance has become a dead letter since the addition of section 25 to that Ordinance and that the object of that section was to bring our law into line with the English law.

I have not referred herein to any of the cases cited by counsel from the Indian Reports because in most of them it is not clear under what particular law they were decided or whether they had any bearing on any law which may have been in force here at any particular time.

It should be remembered that in the present Limitation Ordinance there is no reference to such a term as "cause of action arose", upon which the suit *Ismail bin Savoosah v. Madinasah Merican & Anor. supra* depended, or "such action, right or tittle shall accrue or descend" which was so material in the case of *Murray v. East India Co. supra.* Those cases were decided upon laws then in force which are not in force in these settlements now.

Under the provision of section 3 of the Limitation Ordinance the Court is obliged to dismiss a suit instituted after the period of limitation prescribed therefor, unless there is something in sections 4 to 24 avoiding that provision. Section 16 (1) does avoid that provision but subsection (3) nullifies that avoidance in so far as suits for the possession of immovable property are concerned. And then comes section 25, with its special provision in regard to immovable property, extinguishing the right and title on the determination of the period of limitation.

The plaintiff based her claim on Article 110 in the Schedule to the Limitation Ordinance as is to be inferred from her pleading and, having totally failed to establish any possession in herself at any time or in anybody else as or for her, her sister or father for upwards of 28 years, I doubt that she is entitled to switch over to Article 112 and say that the possession of the 1st defendant was not adverse to herself.

At first I was inclined to think that the fact that the first defendant was paying yearly something in the nature of rent to Noordin, who had taken the place of the other tenant in common, which arrangement was renewed from year to year, was sufficient to prevent the possession of the 1st defendant being adverse in respect of the undivided half share of the plaintiff, but if, as has been said on more than one occasion, (vide the judgment of the Privy Council in *Meyappa Chetty v. Supramanian Chetty supra* and of Gordon-Smith, J. in *In re M. L. Caunter deceased, Ex parte J. D. Caunter & 2 Others supra* the object of the Limitation Ordinance was to bring the law here into line with the English law, and, if that object has been attained in the main, then the possession for the statutory period of one tenant in common to the exclusion of another or others of his co-tenants, if relied upon by him, and if inconsistent with the title of the other or others is sufficient to resist a claim for possession by such other or others. If this is true in the case of a co-tenant it would seem to me that it has greater force in the case

of a stranger who, as in this instance, deliberately set out to oust the owner of the undivided half share which he had no right to occupy and of which he retained the possession for twenty years. If he had acquired an indefeasible right to such share by 1937 he was able to transmit that right on sale to the 2nd defendant.

The 1st defendant never purported to rent the undivided half share in suit or to pay to the owner of the undivided share not in suit anything more than what represented half the profits derived from the whole of the plot. In fact his payments were considerable less than half, because, as he explained, he was doing all the work and making all the expenditure in order to reap the profits. Had he paid rent in respect of the whole plot the plaintiff's claim, it would seem, would be against the co-tenant either alone or jointly with the 1st defendant, but the co-tenant never made any letting of the whole plot to the 1st defendant. On the contrary, according to the 1st defendant, the co-tenant refused to let the whole, saying that the owner of the other undivided half share would make trouble, if he did so.

There is no question of the 1st defendant's possession not being adverse to the plaintiff by reason of being referable to a lawful title in so far as the plaintiff was concerned. His possession was independent of the title of the plaintiff.

I need not pursue the matter further. It seems to me abundantly clear that the right and title of the plaintiff to the land in suit is extinguished.

Claim Dismissed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.